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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R.06-10-005

REPLY COMMENTS OF

CALAVERAS TELEPHONE COMPANY (U 1004 C)
CAL-ORE TELEPHONE CO. (U 1006 C)
DUCOR TELEPHONE COMPANY (U 1007 C)
FORESTHILL TELEPHONE CO. (U 1009 C)
GLOBAL VALLEY NETWORKS, INC. (U 1008 C)
HAPPY VALLEY TELEPHONE COMPANY (U 1010 C)
HORNITOS TELEPHONE COMPANY (U 1011 C)
KERMAN TELEPHONE CO. (U 1012 C)
PINNACLES TELEPHONE CO. (U 1013 C)
THE PONDEROSA TELEPHONE CO. (U 1014 C)
SIERRA TELEPHONE COMPANY, INC. (U 1016 C)
THE SISKIYOU TELEPHONE COMPANY (U 1017 C)
VOLCANO TELEPHONE COMPANY (U 1019 C)
WINTERHAVEN TELEPHONE COMPANY (U 1021 C)

ON PHASE II ISSUES

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June 15, 2007

I. INTRODUCTION.

Pursuant to the Assigned Commissioner's Ruling dated May 7, 2007 ("ACR"), Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Co. (U 1009 C), Global Valley Networks, Inc. (U 1008 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 1013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C), and Winterhaven Telephone Company (U 1021 C) (the "Small LECs") submit these reply comments in response to parties' opening comments on Phase II issues addressing implementation of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), filed on May 31, 2007.[1]

The Small LECs disagree with those parties that suggest that smaller providers should be held to the same build-out standards imposed on larger providers with over 1,000,000 telephone subscribers. The Small LECs lobbied extensively – and successfully – for legislation that would give them greater flexibility relative to video build-out requirements. Any rules adopted to implement California Public Utilities Code Section 5890(c) must reflect the Legislature's intent to create less stringent build-out requirements for smaller providers.

Some parties propose substantial new reporting requirements in their opening comments. In their opening comments, the Small LECs opposed any reporting requirements beyond those specifically mandated in DIVCA. The Small LECs will not repeat their arguments in these reply comments, but reiterate their opposition to the adoption of new reporting requirements beyond those specifically identified in the legislation.

The Small LECs agree with AT&T's proposal to update General Order 169 to provide that when state franchisees intend to offer video service in a new area, they must give notice both to the affected local jurisdictions, and to the incumbent cable providers in the area.

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[1] The Small LECs received opening comments from AT&T California ("AT&T"), California Cable and Telecommunications Association ("CCTA"), California Community Technology Policy Group *et al.* ("CCTPG"), the Division of Ratepayer Advocates ("DRA"), the Greenling Institute ("Greenlining"), SureWest Televideo ("STV"), and Verizon.

II. THE COMMISSION SHOULD REJECT PROPOSALS TO APPLY THE SAME BUILD-OUT STANDARDS TO LARGER AND SMALLER PROVIDERS.

Several commenting parties representing consumer groups contend that build-out requirements applicable to larger providers should apply equally to smaller providers.[2] As discussed in opening comments, applying a one-size-fits-all approach to build-out requirements ignores legislative intent that smaller providers should not be subject to the same build-out requirements applied to larger carriers. Such intent is consistent with the fact that build-out standards reflected in Section 5890(e) were negotiated specifically for AT&T and Verizon. Significantly, the build-out requirements for the two companies are not the same, in recognition of the different technologies and circumstances facing each company As the Senate Floor Analysis for AB 2987 confirms:

> The authors have negotiated buildout commitments from each of the two largest telecommunications companies. Those commitments, 25 percent of customers offered video service within two years, and 40 percent within five years for Verizon, and 35 percent within three years and 50 percent within five years for AT&T, reflect the different technology and installation hurdles faced by each company. While well short of 100 percent, these requirements are far more than either company has agreed to in any other state.[3]

The legislature was clearly concerned that imposing overly-rigorous build-out requirements for the two largest companies could jeopardize video competition in California. Applying standards that represent the most significant build-out commitments in the country by either AT&T or Verizon to smaller providers does not recognize the "different technology and installation hurdles" faced by smaller providers, the very factors that led the Legislature to adopt different standards for each of AT&T and Verizon. If the same build-out standards were inappropriate for AT&T and Verizon, then applying standards applicable to either AT&T or Verizon to smaller providers is even more inappropriate.

Beyond setting general build-out standards for smaller providers that are the same as larger providers, DRA also urges the Commission to apply to smaller providers the Section 5980(b) standards for passing low-income households that apply only to larger providers.[4] In

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[2] *See* CCTPG *et al.* Opening Comments, p. 3; Greenlining Opening Comments, p. 1.

[3] Senate Floor Analysis for AB 2987, August 28, 2006, p. 4.

[4] *See* DRA Opening Comments, p. 2; *see also* Cal. Public Util. Code § 5890(b)..

effect, DRA asks the Commission to ignore the Legislature's intent and apply standards to smaller providers that were only intended to apply to larger providers. This result would clearly contravene the legislative intent underlying DIVCA. DIVCA establishes two build-out frameworks: one for providers with 1,000,000 or more telephone customers and another for those providers with less than 1,000,000 telephone customers. Larger providers have specific build-out requirements for service area coverage (Section 5890(e)) and low-income household coverage (Section 5890(b)). Smaller providers, by contrast, do not have specific build-out benchmarks, but are required to build out in their telephone service area within a reasonable time, subject to the caveat that they do not have to build out in areas where the cost to do so is high (Section 5890(c)). If the Commission were to enforce the Section 5890(c) requirements and add the Section 5890(b) requirements to smaller providers, the Commission would in effect be applying more stringent build-out requirements to smaller providers than to larger providers. Such an outcome is inconsistent with the language of DIVCA, and with the underlying legislative intent that led to that statutory language.

CCTA also appears to contend that safe harbors identified in DIVCA for larger providers should apply equally to all incumbent LECs, regardless of size.[5] While the Small LECs agree in principle with CCTA that the Commission could adopt safe harbors for smaller providers, the Small LECs disagree that the periods of time to meet the safe harbor build-out requirements should be the same as those specified for larger providers. CCTA bases its argument that larger provider safe harbors should be applied to smaller providers without change on the assumption that the Legislature divided the video market into two halves: incumbent LECs and incumbent cable operators. However, CCTA ignores the various versions of AB 2987 and what they reveal about the Legislature's intent. As recently as two weeks prior to its passage by both houses, AB 2987 explicitly separated "telephone service providers of last resort" from non-providers of last resort under the statute. Both of these groups were subject to different standards than those that applied to providers with 1,000,000 or more telephone customers. The fact that smaller ILEC providers were identified for distinct build-out requirements in earlier versions of AB 2987 underscores the legislature's intent to establish distinct build-out requirements for smaller ILEC

[5] *See* CCTA Opening Comments, pp. 5-6 (contending that standards in Section 5890(e) should apply to smaller ILECs).

providers as compared to those build-out standards set forth in Sections 5890(b) and (e) for AT&T and Verizon.

Based on these considerations, the Commission should reject any suggestion that smaller providers should be subject to the same build-out requirements as the larger providers. Instead, the Small LECs support the approach advocated by STV in its opening comments that would adopt safe harbors for smaller providers that are similar to the statutory standards for the larger providers. Consistent with STV's proposal, the Commission should extend the time in which to meet these safe harbor build-out benchmarks, as a further acknowledgement that smaller providers should not be held to the same standards as larger providers. As discussed in the Small LECs' opening comments, such safe harbors should not be deemed the only "reasonable" build-out strategy; rather, each individual smaller provider should have the opportunity to demonstrate that its build-out is occurring at a reasonable pace as contemplated under Section 5890(c) even if it has not met a safe harbor established through this proceeding.

Finally, smaller providers should not have to vet their build-out plans in advance through an application process to demonstrate prospective compliance with Section 5890(c). Contrary to this suggestion, the application process only requires a certification that a provider will comply with the non-discrimination requirements in Section 5890.[6] Instead, any allegations that a smaller provider has not complied with its Section 5890(a) and (c) obligations can be handled through the Commission's complaint / investigation processes, as identified specifically in Appendix G to General Order 169 pertaining to "Investigations into Antidiscrimination and Build-Out Provisions."

To implement the safe harbor approach with the added flexibility of case-by-case determinations, the Small LECs recommend that the Commission modify General Order 169, Section VI.B.1 as follows:

- The Commission should delete subparagraph (3) and insert language stating that subparagraphs (1) and (2) are not the only avenues for demonstrating compliance with Section 5890(c).
- The new Section VI.B.1 should also state that each individual provider bears the burden of demonstrating that its build-out is occurring within a reasonable time in the event that

[6] Cal. Public Util. Code § 5840(e)(1)(B)(i).

a formal complaint case is filed or an Order Instituting Investigation is adopted by the Commission on the subject.

III. THE COMMISSION SHOULD UPDATE GENERAL ORDER 169 TO INCLUDE THE REQUIREMENT THAT STATE-FRANCHISED VIDEO PROVIDERS GIVE NOTICE TO INCUMBENT CABLE OPERATORS OF AN INTENT TO OFFER VIDEO SERVICE IN A PARTICULAR JURISDICTION.

AT&T's opening comments note that General Order 169 did not include the requirement that state-franchised video providers give notice to incumbent cable operators at the same time that the state franchisees provide notice to affected local jurisdictions of their intent to initiate service. It is important that incumbent cable operators also be notified, because this notice provides the basis upon which an incumbent cable operator may exercise abrogation rights provided under Section 5840(o)(3). Because the General Order is much more likely to be a source of information about providers' rights and obligations than the decision adopting the General Order, the Commission should add a new paragraph to Section VI of General Order 169 stating that state-franchised video providers must provide notice to both local jurisdictions and incumbent cable operators when these providers indicate their intent to initiate service in a particular area.

IV. CONCLUSION.

Based on the foregoing, the Commission should establish separate build-out safe harbors for smaller providers without making such safe harbors mandatory construction benchmarks. The Commission should reject proposals to adopt additional, new reporting requirements beyond those identified in DIVCA. Finally, the Commission should update General Order 169 to include the obligation for state-franchised video providers to give notice of their intent to offer service in new areas both to the affected local jurisdictions and to the incumbent cable operators in the affected jurisdictions.

Dated this 15th day of June, 2007, at San Francisco, California.

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CERTIFICATE OF SERVICE

I, Noel Gieleghem, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street, 17th Floor, San Francisco, CA 94111.

On June 15, 2007, I served the following REPLY COMMENTS OF SMALL LECS ON PHASE II ISSUES by placing a true and correct copy thereof with the firm's mailing room personnel, for mailing in accordance with the firm's ordinary practices, addressed to the parties on the CPUC service list for Proceeding No. R. 06-10-005.

Copies were also hand delivered to Assigned ALJs Kotz and Sullivan and Assigned Commissioner Chong.

Copies were also served via e-mail on those parties on the service list who provided an e-mail address.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 2007, at San Francisco, California.

Noel Gieleghem

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